IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 332 OF 2005

Pune Municipal Corporation & Ors.... Appellants.

Versus

Kirloskar Oil Engines Ltd.. ... Respondent.

Mr. V. G. Mujumdar for the Appellants.

Mr. S. G. Karandikar for the Respondent.

CORAM : A. S. OKA, J.

DATED : 19TH APRIL, 2005.

P.C.:

Admit. Learned Counsel appearing for Respondent waives service. Taken up for hearing forthwith.

2. Challenge in this appeal from order by the original Defendants is to the judgment and order dated 19th July, 2003 passed by the learned 5th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.765 of 2002, by which temporary injunction has been granted in favour of the Respondent / Plaintiff.

3. Shri Mujumdar, learned Counsel appearing for the Appellants, submitted that in the reply filed by the Appellants / Defendants to the application for temporary injunction, a specific contention was raised that the trial Court had no jurisdiction to entertain and try the suit. It was contended that remedy of preferring an appeal under Section 406 of the Bombay Provincial Municipal Corporations Act, 1949 was available to the Respondent / Plaintiff. He submitted that in view of mandate of Section 9-A of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code") the trial Court was under an obligation to frame an issue of jurisdiction and to decide the same. He, therefore, submitted that the order granting temporary injunction without following mandatory provision of Section 9-A of the said Code will have to be quashed and set aside. Learned Counsel appearing for the Respondent has supported the impugned judgment and order.

4. I have considered the rival submissions. Paragraph 6 of the reply filed by the Appellants to application for temporary injunction made by the Respondent / Plaintiff reads thus:

> "6. No cause of action ever arose for filing of the present suit much less on the dates of mentioned in para 12 of the plaint. The defendants submit that the subject matter of the suit pertains to levy of taxes and hence Hon. Court has no jurisdiction to try and entertain the present suit. The defendants respectfully submit that maintainability of the suit and the point of jurisdiction go to the root of the matter and the same may be framed and decided as preliminary issue."

5. Thus there was a clear challenge to the jurisdiction of the trial Court raised in the reply filed by the Appellants. In view of the law laid down by this Court in a judgment reported in 1998 (3) Mh.L.J. 940 (**Meher Singh v/s Deepak Sawhny**), learned trial Judge ought to have framed the preliminary issue on jurisdiction and ought to have given opportunity to both the parties to lead evidence. The application for temporary injunction ought to have been heard either along with the preliminary issue or after deciding the preliminary issue. Learned trial Judge has not followed the mandate of the statute and the

law laid down by the Division Bench of this Court in the case of **Meher Singh (Supra)**.

6. Shri Karandikar, learned Counsel appearing for the Respondent, pointed out that even during the pendency of the application at Exhibit 5 the Respondent / Plaintiff was protected by an ad-interim order. Therefore, till the decision of the trial Court on preliminary issue, interim protection granted by the trial Court will have to be continued.

7. Hence, I pass the following order:-

(a) Impugned Judgment and Order dated 19th July, 2003 is quashed and set aside and the Application at Exhibit 5 is restored to file.

(b) Learned trial Judge will frame preliminary issue of jurisdiction and will decide the same as expeditiously as possible and in any event on or before 31st July, 2005 after giving opportunity to both the parties to lead evidence.

(c) Learned trial Judge will take up application at Exhibit 5 for hearing immediately after the decision on preliminary issue, if the said decision is in favour of the Respondent / Plaintiff.

(d) Till the date of passing order on preliminary issue and for a period of 15 days thereafter, the temporary injunction granted by the impugned judgment and order dated 19th July, 2003 will continue to operate as ad-interim relief.

(e) All contentions of the parties on merits are kept open.

8. Appeal from Order is partly allowed in above terms with no order as to costs.

9. Parties and the concerned Court to act on an authenticated copy of this order.

Sd/-

(**A. S. OKA, J.**)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 565 OF 2005

IN

APPEAL FROM ORDER NO. 332 OF 2005

Pune Municipal Corporation & Ors.... Appellants.

Versus

Kirloskar Oil Engines Ltd.. ... Respondent.

Mr. V. G. Mujumdar for the Appellants.

Mr. S. G. Karandikar for the Respondent.

CORAM : A. S. OKA, J.

DATED : 19TH APRIL, 2005.

P.C.:

In view of the order passed in the Appeal from

Order, this Civil Application does not survive. Hence rejected.

Sd/-

(A. S. OKA, J.)